No. 4065

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

H. O. HARRISON Co. (a corporation),
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

REDMAN & ALEXANDER,
Attorneys for Plaintiff in Error.

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Statement of the Case.

On the 14th day of December, 1922, one Modesti was in possession of an Essex touring automobile, 1922 model, license No. 604483, under a valid contract of conditional sale dated April 14, 1922. H. O. Harrison Co., the plaintiff in error, hereinafter called the plaintiff, was the vendor of the automobile in the contract of sale (Tr. pp. 35-36).

On said day while said contract was in force and effect Modesti was arrested in San Francisco and the said automobile was seized by Federal Prohibition agents. On February 15, 1923, an information charging Modesti with the unlawful possession and transportation of intoxicating liquor in violation of the National Prohibition Act was filed by the

United States District Attorney in the United States District Court for the Northern District of California. On March 17, 1923, Modesti was arraigned, pleaded guilty to the charges, was sentenced to pay and did pay a fine of $400.00. Thereafter on March 21, 1923, the District Court made an order for the sale of said automobile (Tr. p. 7).

At no time did plaintiff herein have any notice or knowledge or reason to believe that the automobile would be or was used for purposes in violation of the National Prohibition Act. At the time it was seized there was a balance on the purchase price of $198.06 due plaintiff. On March 29, 1923, plaintiff filed a verified application in the proceedings against Modesti praying for the allowance of a lien in that amount in its favor against the automobile or the proceeds of the sale thereof. This application was heard by the court on April 3, 1923, and on April 14, 1923, the court denied the same (Tr. p. 14).

Exception to this ruling was taken and thereafter, in due time, a bill of exceptions was duly settled and filed together with an assignment of errors.

Specifications of Error.

1. The court erred in refusing to grant the application of plaintiff for the allowance of a lien in its behalf against the seized automobile or against the proceeds of the sale of said automobile for the unpaid balance due it under its contract, for the reason

that it had a valid and existing claim against said automobile as contemplated by Section 26 of the National Prohibition Act.

2. The court erred in denying the application of plaintiff for the allowance of the balance of the purchase price due under its contract out of the proceeds of the sale of the confiscated automobile.

Argument.

I.

THE PROVISIONS OF THE NATIONAL PROHIBITION ACT WERE SO FRAMED AS TO PROTECT THE INTERESTS OF INNOCENT PERSONS IN SEIZED PROPERTY FROM FORFEITURE.

Under several of the internal revenue statutes in existence prior to the enactment of the National Prohibition Act provision was made for the seizure and forfeiture of vehicles used in the transportation of certain commodities. In enforcing these provisions the courts indulged in the fiction that the vehicle itself was the offender and forfeitable irrespective of the guilt or innocence of its owner. Section 3450 U. S. R. S. is an example of such statutes; it provided for the forfeiture of a conveyance used in moving commodities upon which the revenue tax had not been paid. The courts in construing the meaning of the section held in many cases down to and including *Goldsmith v. U. S.*, 254 U. S. 505, that the conveyance was forfeited wholly without regard to the guilt or innocence of the owner or lien

holder. In referring to these old forfeiture statutes the Editor of the Third Edition of Babbitt's "The Law Applied to Motor Vehicles", p. 139, says:

> "Like most legal excesses, however, this one bids fair to be short-lived and there is a tendency to be noted, both in the more recent statutes, as in the Volstead Act, and in the decisions, to forfeit interests only of those having guilty knowledge or grounds of suspicion of illegal use."

In framing the provisions of the National Prohibition Act Congress had in mind the drastic and often unjust effects of the confiscatory provisions of these revenue statutes. A reading of Section 26 of said Act discloses that Congress sought to avoid such injustice in dealing with the vehicles seized under this act. The pertinent portions of Section 26 are as follows:

> "Sec. 26. * * * Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, * * * and shall arrest any person in charge thereof. * * * the said vehicle or conveyance shall be returned to the owner by execution by him of a good and valid bond, * * * which said bond * * * shall be conditioned to return said property to the custody of said officer on the day of Trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and *unless good cause to the contrary is shown by the owner,* shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost

> of the sale, *shall pay all liens,* according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been correct without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. * * *" (Italics ours.)

It must be presumed that Congress in framing this section was not only aware of the injustices worked by the confiscatory provisions of the old customs and revenue acts, but that it also had in mind the fourth amendment of the Federal Constitution which reads:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated * * *."

And the courts in interpreting the language used by Congress in this section have done so in the light of this amendment and of the principles of construction applicable to such measures. In 25 Corpus Juris 1172 the rule is stated as follows:

> "A statute imposing a forfeiture should be construed strictly and in a manner as favorable to the person whose property is to be seized as is consistent with the fair principles of interpretation. The courts will usually give such a construction to statutes providing for for-

feitures as will be consistent with justice and the dictates of natural reason, although contrary to the strict letter of the law."

See,

U. S. v. Myers, 287 Fed. 260;
U. S. v. One Cadillac Eight Automobile, 255 Fed. 173, 175;
U. S. v. Mincey, 254 Fed. 287, 289 (dissenting opinion).

An exhaustive examination of the cases in which Section 26 has been construed reveals that the courts guided by these principles have afforded to all innocent interested persons the protection clearly intended by Congress. And where the government has endeavored to exact forfeitures under a prior customs or revenue law, the courts have held that the exclusive procedure in the cases involving intoxicating liquor was under the National Prohibition Act, which provides a complete scheme to the exclusion of other statutes and affords protection to innocent interested persons. See

U. S. v. Brockley, 266 Fed. 1001;
The Saxon, 269 Fed. 639;
U. S. v. One Haynes Automobile, 268 Fed. 1003;
The Goodhope, 268 Fed. 694;
U. S. v. Sylvester, 273 Fed. 253;
U. S. v. One Hudson Automobile, 274 Fed. 473;
U. S. v. One Paige Auto, et al., 277 Fed. 524;
The Coldwater, 283 Fed. 146.

In *The Saxon,* supra, to avoid injustice to the owner of a seized vessel it was ordered released without bond pending the termination of the criminal proceedings against those in charge of it. In *U. S. v. One Paige Auto, et al.,* supra, the court ordered forfeiture and allowance of a lien under Section 26 of the Prohibition Act although the proceedings of forfeiture were brought under a customs law which did not provide for the allowance of liens in favor of interested persons.

The rights of innocent persons have been regarded by the courts of such importance as to compel the conclusion that the drastic forfeiture provisions of the customs and revenue laws, such as Section 3450 U. S. R. S., so far as they apply to intoxicating liquor, were impliedly repealed by the provisions of the National Prohibition Act. See

U. S. v. One Hudson Automobile, 274 Fed. 473;

U. S. v. One Haynes Auto, et al., 268 Fed. 1003;

U. S. v. One Haynes Automobile, 274 Fed. 926;

Lewis v. U. S., 280 Fed. 5.

In the case last cited the court said:

> "The punishment provided under Section 3450, as it has been construed (Goldsmith v. U. S., 254 U. S. 505, 41 Sup. Ct. 189, 65 L. Ed.), was the confiscation of the automobile wholly without regard to the question whether the owner or lien holder was in any degree at fault; the punishment provided by the National Pro-

> hibition Act (Section 26) was a forfeiture of the machine *to the extent only of the interest of those persons who were connected with the offense in some degree of responsibility, guilt or negligence.* * * *
>
> We are not advised of any other supposed distinctions between the question now presented and that which has been decided by the Supreme Court, and our views concerning those which we have now considered make it necessary to hold that Section 3450 is so far repealed that there cannot be a forfeiture thereunder of the means used in transporting or concealing intoxicating liquor manufactured and intended for beverage purposes." (Italics ours.)

And the question was settled in this circuit in the case of *McDowell v. U. S.*, No. 3865, decided February 5, 1923, where this court said:

> "Our conclusion is that in so far as it is provided by Section 3450 for the forfeiture of automobiles used to transport liquor upon which the tax has not been paid, the section has been repealed by the provisions of the National Prohibition Act, and that the conclusion of the District Court was erroneous."

II.

A CONDITIONAL VENDOR IS ENTITLED UNDER THE ACT TO THE SAME PROTECTION GIVEN TO OTHER INNOCENT PERSONS HAVING AN INTEREST IN THE VEHICLE SEIZED.

In this case the plaintiff is the conditional vendor of the automobile seized and ordered sold by the District Court and has asked that its claim for the balance of the purchase price due it under the con-

ditional sale contract be paid to it out of the proceeds of the sale of the automobile. It was conceded that plaintiff was entirely innocent in the premises, that it had no notice or knowledge and no reason to suspect that the automobile sold by it to Modesti would be used by him in violation of the National Prohibition Act.

The view taken by the learned judge of the trial court was that plaintiff was the legal *owner* of the automobile and therefore could have no *lien* upon it; that as such legal owner plaintiff "may determine who shall have the use of a vehicle and thus, in a measure, control such use", and that therefore it should be held responsible for its misuse.

This view, we submit, is not in harmony with the trend of the decisions, nor is it such a construction of the statute as carries out the manifest intent of Congress in enacting it. It is true that the statute does not expressly name conditional vendors, but as it protects the rights of lienors, *a fortiori* it must be assumed that the rights also of innocent vendors are intended to be protected. Under the terms of the contract of *sale* (Tr. p. 35) the vendor has no more control over the use of the automobile than if he had sold it outright and taken a mortgage back to secure the payment of the balance of the purchase price.

It is incredible that Congress intended to protect the rights of a *lienor* and ignore the rights of the *vendor*. It is immaterial that the *legal title* remains

in the vendor. The *equitable ownership* is vested in the vendee, who for all practical purposes is as much the owner as if he had paid the entire purchase price. There is no conceivable rational reason for drawing any distinction between an innocent vendor and an innocent lienor.

Moreover, the statute *expressly provides* that the automobile shall not be confiscated if the "owner" shows "good cause" why it should not be. What *better* showing could be made than was made in this case?

The law of Connecticut relative to conditional sales is similar to that of California. The United States District Court for that state in construing the provisions of Section 26 held, that a conditional vendor is entitled to receive the balance due him on his contract out of the proceeds of the sale of the automobile. See

U. S. v. Sylvester, 273 Fed. 253.

In its opinion the court says:

> "The intent of the Congress, as disclosed in section 26, here under discussion, is clearly expressed. The conclusions respecting its interpretation are:
>
> First. The seizure, forfeiture, and sale of vehicles is not absolute, as under section 3450 of the Revised Statutes, but is subject to the order of court after it has heard all the facts of each case.
>
> Second. An owner who transports intoxicating liquor illegally forfeits the intoxicating liquor and the vehicle and suffers a penalty.

Third. A conditional vendor or a mortgagee, who allows the vehicle to be used for such unlawful purpose with his knowledge, or who gives his consent to the illicit transportation, shall also forfeit all interest in or his lien upon the vehicle.

Fourth. A bona fide vendor or mortgagee, without having any notice that the vehicle was being used or was to be used for the illegal transportation of intoxicating liquor, shall be protected to the amount of his bona fide lien, as far as possible.

Fifth. The owner of a vehicle, who loaned it to another, who, in turn, transported intoxicating liquor therein, is entitled to a return of the vehicle, where he had no knowledge of the purpose of the borrower, and no facts are shown which should have aroused his suspicion.

Sixth. In the second and third instances, the vehicle shall be sold by the United States marshal at public auction, and after all the costs are paid as provided by law, then the balance of the proceeds of the sale shall be turned into the treasury of the United States.

Seventh. In the fourth instance, after the bona fide lien and lack of notice or knowledge have been established, the vehicle shall be sold at public auction, and after the costs, as provided by law, have been paid, the United States marshal shall then pay, if possible, the amount of the bona fide lien in full to the proper person, and the balance, if any, shall be turned into the treasury of the United States." (Italics ours.)

The court held that Congress intended to protect *all innocent interested persons* against unnecessary and unjust penalties and construed the act to embrace vendors as well as lienors.

The provision in the National Prohibition Act preserving the rights of a lienor *implies as a matter of course* that a vendor's rights and interests were to be preserved. There is no reason whatever why Congress should have protected a lienor, such as a mortgagee, and not have protected a conditional sale vendor, who occupies no different position than a mortgagee except that he retains the legal title to the property. So far as the use to which the property may be put by the vendee or mortgagor their positions are identical. The only distinction in their positions is one of procedure. Either may sue for the amount due upon default or breach, or either may repossess the property, in which case the conditional vendor having retained legal title holds the property without further procedure, whereas the mortgagee must foreclose the mortgagor's interest in order to clear the title. *In the matter of control over the property before breach, however, there is no distinction whatever.*

Congress must be deemed to have had this situation in mind in framing the provisions of Section 26. And Congress must also be regarded as having in mind that upon execution of a conditional sale contract the vendor delivers the property into the *possession of the vendee* and preserves only a right to retake it *in the event of a breach by the vendee.* The control over the use of the vehicle lies absolutely in the vendee. Automobiles, of course, could not be sold without the right to the vendee to control the use of the car. The sale makes the vendee an

equitable owner leaving the position of the vendor virtually the same so far as the Prohibition Act is concerned as a mortgagee.

In construing a state prohibition statute containing a forfeiture provision, the Supreme Court of the State of Alabama said:

> "But it could not have been the purpose of the Legislature, had it the constitutional right to do so, which we do not decide, to confiscate the property of innocent people or to make vendors and mortgagees of vehicles or other property insurers or guarantors of the conduct of their mortgagors or vendees, notwithstanding they may have exercised ordinary diligence and prudence in making the sale or taking the mortgage, and which would be the result if they are required to keep up with them all the time."
>
> *Flint v. State,* 85 So. 741 (Ala.).

See, also,

Bowling v. State, 85 So. 500 (Ala.);
Hatcher v. Foster, 101 S. E. 299 (Ga.);
Packard v. State, 86 So. 21 (Ala.).

An important decision, directly in point, by Mr. Justice Rudkin, sitting as a trial judge, was rendered in the cases of

U. S. v. P. S. Smith and R. V. Tucker, No. 5239, and
U. S. v. Dick Carlow, No. 5400.

As we do not find the opinion in these cases reported, we have appended hereto a copy thereof. (See appendix.) It is in entire harmony with the views for which we are contending.

In these cases conditional sale vendors made claim for the return of automobiles seized by Federal Prohibition Agents, it being the contention of the claimants that they were the "owners" of the automobiles and therefore could reclaim them upon a showing that they had no knowledge or reason to believe that the property was used or to be used for illegal purposes in violation of the National Prohibition Act. It should be noted that these cases arose in the district of Washington where the law relative to conditional sales contracts is substantially the same as the law in California. As Justice Rudkin says in his opinion:

> "That such an owner or vendor is not a lienor is well settled by the decisions of the Supreme Court of this state (Washington)."

After quoting from two Washington cases supporting his statement, he continues:

> "The rule thus stated is not only sound in law, but is controlling upon this court. It must be held, therefore, that the vendor in such a contract is not a mere lienor within the meaning of the law. On the other hand, I am not prepared to hold that such a vendor can reclaim his property absolutely and unconditionally. Before condition broken the purchaser has an interest in the property, and that interest is undoubtedly subject to condemnation and forfeiture. How then may the rights of the conditional vendor be saved without defeating the policy of the law. In my view the way is simple. If in the opinion of the court the property will not sell for enough at forced sale to satisfy the claim of the vendor, no sale should be ordered, and the property should be restored absolutely and unconditionally to the owner.

> If, on the other hand, in the opinion of the court the property will bring more than the claim of the vendor, it should be ordered sold, but upon condition that no sale should be made for less than the amount of the unpaid purchase price. If a bid for more than that amount is not forthcoming the property should be restored to the owner; if a larger amount is bid the property should be sold and the owner paid the full amount of his claim out of the purchase price without deductions of any kind. This procedure will protect the rights of all concerned and impair the rights of none."

The court held that although the vendor was not technically a lienor he was entitled to a lien upon the proceeds of the sale, but limits his recovery to his interest in the automobile (the unpaid balance of the purchase price), notwithstanding his *technical ownership thereof,* which under a more liberal construction would entitle him to a *return of the automobile itself* upon a showing of innocence.

In other words, the view taken by the learned Justice is that although *technically* the vendor has, under the law after condition broken, the right to make claim to the *whole* car, yet properly construed the act requires that his status be *reduced to that of a mere lienor.* With him it went without saying that Congress intended to protect the interests of the vendor as well as the interests of a lienor.

This, we submit, is the just and sound construction of the statute. The vendor is protected only to the extent of the balance due under the terms of the contract of sale, just as in the case of a sale with

mortgage back securing the unpaid portion of the purchase price. It is elementary and fundamental that a statute should be given a construction "consistent with justice and the dictates of natural reason".

The Government which was established to protect the rights of citizens should not be converted into an instrument for the perpetration upon them of palpable injustice.

For these reasons it is respectfully submitted that the judgment should be reversed.

Dated, San Francisco,
October 10, 1923.

REDMAN & ALEXANDER,
Attorneys for Plaintiff in Error.

(APPENDIX FOLLOWS.)

Appendix.

Appendix

In the District Court of the United States for the Western District of Washington

NORTHERN DIVISION

United States of America, Plaintiff, vs. P. S. Smith and R. V. Tucker, Defendants.	No. 5239
United States of America, Plaintiff, vs. Dick Carlow, Defendant.	No. 5400

MEMORANDUM.

United States Attorney, for Plaintiff.

George L. Spirk, for Claimants and Interveners.

Rudkin, District Judge. These cases call for a construction of the provisions of the National Prohibition Act relating to the seizure and forfeiture of vehicles used in the illegal transportation of intoxicating liquors. The claimants and interveners are vendors in conditional sale contracts, the transportation was by the purchasers, and the vendors had no knowledge or reason to believe that the property was being used for an illegal purpose.

Section 26 of the act provides, among other things, as follows:

> "Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure and the cost of the sale shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lien or having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property."

It will be observed that the rights of two classes are thus saved and protected from the forfeiture; first, the owner, who shows good cause to the contrary; and second, bona fide liens "created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor". This section does not undertake to define what will constitute good cause to the contrary, but by referring back to Section 21 of the act it at once becomes manifest that the owner must show merely that he had no knowledge or reason to believe that the property was used or to be used for the illegal transportation of intoxicating liquor. Again, the innocent owner may reclaim his property and avoid a sale, while a mere lien is simply transferred from the property to the proceeds of the sale, and the liens are paid out of such proceeds according to priorities, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale.

What then is the status of the vendor in the conditional contract of sale. The claimants and interveners claim that he is the owner and may reclaim his property, while the Government claims that he is a mere lienor and must resort to the proceeds of the sale for the satisfaction of his claim. That such an owner or vendor is not a lienor is well settled by the decisions of the Supreme Court of this state. Thus, in Winton Motor Car Co. v. Broadway Auto Co., 65 Wash. 650, 654, the Court said:

> "The title, which is by this contract reserved in the seller, is the absolute title, under which he may retake the property, if at all, and retain it without an obligation whatever to account therefor, or for any surplus of the value thereof above the unpaid purchase price, to the purchaser. The thing which our law recognizes as being retained by the seller under this contract is not a mere lien or equity securing the balance of the purchase price, but the absolute title, which remains in him or passes from him to the purchaser absolutely, accordingly as the conditions of the sale are broken, or as they are fulfilled, or as may result from some act of election on the part of the seller."

The court then quoted with approval from Crompton v. Beach, 62 Conn. 25, and Alden v. Dyer & Bro., 92 Minn. 134, as follows:

> "A contract of conditional sale imposes no lien upon property in favor of the vendor, for that or any other purpose. He does not sell, and receive back a pledge. He retains the title until he elects to part with it, and when he does so elect, the title passes from him; but nothing else thereby springs up in its place in the nature of a lien or incumbrance upon the property, inuring to his benefit. * * * It must now be regarded as the settled law of this state, as well as in most others, that where personal property is sold and delivered with an agreement that the title thereto shall remain in the vendor until the payment of the purchase price, it is a conditional sale, and the transaction cannot be held a mortgage; and it is equally as well settled that, upon the vendee's failure to comply with the condition as to payment, the vendor may elect to retake the property, or may treat the sale as absolute, and bring an action for the

price, but the assertion of either right is an abandonment or waiver of the other."

The rule thus stated is not only sound in law, but is controlling upon this court. It must be held, therefore, that the vendor in such a contract is not a mere lienor within the meaning of the law. On the other hand, I am not prepared to hold that such a vendor can reclaim his property absolutely and unconditionally. Before condition broken the purchaser has an interest in the property, and that interest is undoubtedly subject to condemnation and forfeiture. How then may the rights of the conditional vendor be saved without defeating the policy of the law. In my view the way is simple. If in the opinion of the court the property will not sell for enough at forced sale to satisfy the claim of the vendor, no sale should be ordered, and the property should be restored absolutely and unconditionally to the owner. If, on the other hand, in the opinion of the court the property will bring more than the claim of the vendor, it should be ordered sold, but upon condition that no sale should be made for less than the amount of the unpaid purchase price. If a bid for more than that amount is not forthcoming the property should be restored to the owner; if a larger amount is bid the property should be sold and the owner paid the full amount of his claim out of the purchase price without deductions of any kind. This procedure will protect the rights of all concerned and impair the rights of none.

In the first case, where the property was used for an illegal purpose by a mere bailee without the knowledge or consent of either the vendor in the conditional contract of sale or the purchaser, the property must of course be restored to the owner. In the other case a decree will be entered in accordance with the facts as they may be shown to exist.